88-1599

Supreme Court, U.S.
FILED
MAR 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

In Re: FRANK J. VONDERSAAR,
Petitioner

On Writ of Mandamus to United States Court of Appeals for the Sixth Circuit

# PETITION FOR WRIT OF MANDAMUS

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## QUESTION PRESENTED

Did the district court err in refusing to rule on a motion for preliminary injunction for a period of over four months?

## PARTIES TO THE PROCEEDING BELOW

Edwin Meese, III; Caspar W. Weinberger; Elizabeth H. Dole; William Barney, III; Michal Varner; Judson Shattuck; Leslie J. Vondersaar nka Steadman; Jene Fuller and James Fuller.

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PRAYER

Petitioner prays for a writ of mandamus directed to the United States District Court for the Southern District of Ohio, Western Division at Dayton, directing and commanding the Honorable Herman J. Weber to immediately rule on the motion for preliminary injunction filed by petitioner on 2 November 1988. Petitioner also requests an order directing and commanding the Honorable Herman J. Weber to resume action on this case, contra his order of Feb 3, 1989 in appendix.

## OPINION BELOW

The District Court has refused to rule on petitioner's motion for preliminary injunction for over four months.

Petitioner filed an appeal with the U.S. Court of Appeals for the Sixth Circuit in December 1988. Reference Sixth Circuit Case No. 88-4175. While the appeal was pending, petitioner moved the Court of Appeals to grant a preliminary injunction. That motion was ignored by the Sixth Circuit from 29 December 1988 until the appeal was dismissed. The appeal was dismissed on jurisdictional grounds on 16 February 1989. Petitioner objected to the dismissal and moved to amend his appeal to correct jurisdictional problems, per 28 USC 1653. The Court of Appeals denied a motion to reconsider, without addressing the motion to amend. See appendix

## JURISDICTION

Jurisdiction for issuance of the writ is provided for in 28 USC 1651(a). Petitioner's appeal to the U.S. Court of Appeals for the Sixth Circuit was dismissed on jurisdictional grounds. The Sixth Circuit has refused to reconsider, or to allow amendment to correct jurisdictional problems. Time is of the essence.

In particular, the relief sought is not available in any other court because: (1)petitioner requests a writ to command a Federal District Court Judge to timely execute his Constitutional duty to rule on a motion for preliminary injunction; (2)only the U.S. Supreme Court and the Sixth Circuit Court of Appeals have jurisdiction to issue such a writ; (3)petitioner has unsuccessfully attempted to obtain the writ from the Sixth Circuit. See appendix.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

Refusal of the District Court to rule on petitioners motion for preliminary injunction has deprived petitioner of his right to due process of law as guaranteed by the Fifth Amendment to the U.S. Constitution, and to his Constitutional right to familial association with his daughter, as interpretted in Quillon v. Wallcott, 434 U.S. 494 (1978) and Santosky v. Kramer, 455 U.S. 745 (1982).

## STATEMENT OF THE CASE

Petitioner, Frank J. Vondersaar, filed suit against defendants Edwin Meese, et. al. in U.S. District Court in Dayton, Ohio, on 2 June 1988. The principal case alleged a conspiracy on the part of the U.S. Departments of Justice, Defense and Transportation as well as other individuals to deprive

petioner of his civil rights. Reference Southern District of Ohio Case No. C-3-88-269. Petitioner filed a motion for preliminary injunction in that case on 2 November 1988. Despite a motion requesting an immediate ruling on the preliminary injunction, filed 21 November 1988, the District Court has refused for over four months to rule on the preliminary injunction motion.

EXISTENCE OF JURISDICTION BELOW

Jurisdiction in the District Court is based upon violation by defendants of the U.S. Constitution and 42 USC 1983, 1985 and 1986. Alternatively, jurisdiction is based on diversity. Jurisdiction in the Court of Appeals was initially pled based upon the District Courts "de facto" denial of petitioner's motion for preliminary injunction. Following dismissal by the Court of Appeals, petitioner moved to amend his

appeal to request a writ of mandamus from the Court of Appeals under 28 USC 1651(A). The request to amend was not ruled on by the Sixth Circuit in it's order denying a rehearing.

REASONS FOR GRANTING THE WRIT

The refusal of the District Court to rule on petitioners motion for preliminary injunction in over four months makes a mockery of the U.S. Constitution's guarantee of equal protection under the law and specifically violates the "due process" clause of the Fifth Amendment. In refusing to rule on petitioners motion in a timely manner, the District Court has effectively deprived petitioner of his liberty interest of familial association with his daughter. Even if the District Court had denied petitioner's motion in a timely manner, petitioner could have appealled that

denial three months ago. The obvious attempt by the District Court and the Court of Appeals to avoid their Constitutional obligation to decide matters of law, and in so doing, undermining the rule of law in the United States, should be overruled by the Supreme Court.

The adage "justice delayed is justice denied" can have no clearer manifestation than in this case. In attempting to deny petitioner access to the courts, the District Court did not even exhibit the temerity shown by the Sixth Circuit when it issued a sleazy dismissal during a time petitioner had notified the Court of Appeals he would be out of state and unavailable. The District Court has chosen to take a more indirect route by merely ignoring petitioner for over four months.

Petitioner notes that in the Sixth Circuit dismissal of the appeal, filed

Feb 16. 1989, the court indicated "the record discloses that the district court is presently engaged in the prompt disposition of his request for injunctive relief." If the Sixth Circuit considers no ruling on a motion for preliminary injunction in over four months to be "prompt disposition". petitioner suggests the new program for drug testing of federal employees begin with the bench of the Sixth Circuit.

Petitioner pointed out to the Sixth Circuit Court of Appeals that their dismissal of petitioner's appeal had all of the equitable, moral and ethical persuasiveness of the pre-Civil War, U.S. Supreme Court's infamous Dred Scot decision. I urge this Supreme Court to immediately grant the Writ of Mandamus petitioner requests and thereby refuse to add it's weight to the already disgraceful abuse of the U.S. legal justice system that has taken place in

this case. The Court should avoid the temptation to add Vondersaar to the list of Dred Scott and Korematsu.

Frank J. Vondersaar

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# APPENDIX

US COURT OF APPEALS FOR SIXTH CIRCUIT

No. 88-4175 filed Mar 21, 1989 ORDER

BEFORE: GUY and NORRIS, CJ; and BELL, DJ

This pro se appellant has moved for the reconsideration of this court's order of Feb. 16, 1989, which dismissed his appeal for lack of jurisdiction.

After careful consideration of the motion to reconsider, the panel concludes that it committed no misapprehension of law or fact in its order of Feb. 16, 1989. Fed. R. App. P. 40(a).

Accordingly, it is ORDERED that the motion to reconsider be and hereby is denied.

U.S. COURT OF APPEALS SIXTH CIRCUIT

No. 88-4175 filed 27 Feb. 1989

**PLAINTIFF-APPELLANT'S OBJECTION TO ORDER OF DISMISSAL, MOTION FOR RELIEF FROM ORDER, AND MOTION TO AMEND**

Plaintiff-appellant, Frank J. Vondersaar, hereby objects to the February 16, 1989 Order of the Court dismissing this appeal for lack of jurisdiction, for the reasons stated in the memo below. Plaintiff also moves the Court for relief from that order, under FRCP 60 (b)(1), for the mistake of plaintiff in requesting the wrong relief, as set forth below. Plaintiff also moves the Court to amend plaintiff's brief, reply and/or notice of appeal, as allowed by 28 USC 1653, to correct the defective allegation of jurisdiction.

MEMORANDUM

1.Plaintiff-appellant objects to the

Feb. 16, 1989 Order to Dismiss this appeal for the following reasons. First, the court acted improperly in dismissing the appeal rather than requesting plaintiff amend his pleadings to properly allege jurisdiction as allowed by 28 USC 1653, particularily in view of plaintiff being a pro se appellant. Second, the court exhibited bias and sleazy methods in issuing it's order during the time plaintiff had notified the clerk of the court by mail in January 1989 that plaintiff would be out of the state and unavailable during late February. (Exhibit 1) Except for an early return, plaintiff would have missed the 10 day window for objecting to this improper order. As it is, plaintiff had less than 24 hours to research this Objection, prepare it and deliver it to the clerk. The Courts sudden rush to issue it's order while plaintiff was out of state is further

highlighted by its contrast to the Courts refusal to rule for over a month on plaintiff's motion to the Court of Appeal for preliminary injunction. Finally, plaintiff disputes the dicta in the order that states that plaintiff is not entitled to relief in the form of a writ of mandamus, as the facts in this case clearly indicate that writ would be appropriate. The writ is to be used in federal court to "confine an inferior court to a lawful exercise of its prescribed jurisdiction OR TO COMPEL IT TO EXERCISE ITS AUTHORUTY WHEN IT IS ITS DUTY TO DO SO." Will v. United States, 389 U.S. 90,95.

2.Plaintiff requests relief from the Order to Dismiss, based on plaintiff's mistake in requesting legal rather than equitable relief from the Court of Appeals in this case. FRCP rule 60 (b)(1) clearly allows such relief, and such relief is justified based on the

reasons in para 1.

3.Plaintiff moves to amend all relevant pleadings in this appeal to reflect his request for equitable relief, in the form of a writ of mandamus, rather than legal relief by way of appeal.

Such amendment is specifically authorized by 28 USC 1653, and is appropriate in this case. Plaintiff hereby amends appellant's brief, reply and/or notice of appeal to reflect his request for relief to be in the form of a writ of mandamus, directing the trial judge to immediately rule on plaintiff's motion for preliminary injunction filed in the trial court in November 1988, and ignored by the trial judge for the past three months.

4.In the event the Court refuses to grant either of the above motions, plaintiff requests the Court to instruct the trial court to resume its "timely?" disposition of plaintiff's case, since

Judge Weber has indicated he will take no action until directed to do so by the Court of Appeals. (Exhibit 2)

5.Finally, appellant would point out that, while the Court of Appeals Order to Dismiss might arguably be technically justifiable, it has all of the equitable, moral aud ethical persuasiveness of the pre-Civil War U.S. Supreme Court's infamous Dread Scott decision.

US COURT OF APPEALS FOR SIXTH CIRCUIT

No. 88-4175 filed Feb 16, 1989 ORDER

Before: GUY and NORRIS, CJ; and BELL, DJ

This matter is before the court upon consideration of appellees' motion to dismiss the appeal for want of jurisdiction. Appellant has filed a response to that motion. In addition, he also seeks a preliminary injunction by this court, and has filed a motion requesting expedited review of that matter.

Review of the record, particularly the district court's docket sheet, indicates that on June 2, 1988, appellant filed a complaint pursuant to 42 USC 1983, 1985, and 1986 and Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), in the District Court for the Southern District of Ohio. The district court then referred the case to a magistrate for consideration of any pretrial motions under 28 USC

636(b), including appellant's motion for a preliminary injunction. Despite appellant's request for immediate action inregard to that motion, the magistrate declined to address the matter pending his receipt of additional pleadings from the parties concerning the question of subject matter jurisdiction. Appellant then objected to the magistrates refusal to act by filing an "appeal" to a judge of the district court on Dec 7,1988. After passage of five days without any further action on the part of the district court, appellant filed this appeal, based upon the belief that the district court's failure to immediately rule upon his motion for a preliminary injunction constituted de facto denial of his request for that relief.

Appelees now move to dismiss the appeal due to lack of jurisdiction. We agree. Pursuant to 18 USC 1291 and 1292 this court only has jurisdiction over

appeals from a final order or judgment or certain, specified interlocutory orders of the district court. The existence of some type of order or judgment is a prerequisite under either statute. Consideration of the above facts demonstrates that the instant appeal simply does not satisfy that requirement as the district court has yet to act upon appellant's request for a preliminary injunction. Appellant concedes this fact in his notice of appeal, but argues that the district court's refusal to issue an immediate injunction stands as a "de facto" denial of that relief, thereby giving rise to appellate jurisdiction. No authority, statutory or other, supports such a proposition. At most, appellant could challenge the district court's refusal to take action on his motion for preliminary injunction by resorting to a petition for a writ of mandamus under 28

USC 1651. Appellant, however, is clearly not entitled to such extraordinary relief, especially as the record discloses that the district court is presently engaged in the prompt disposition of his request for injunctive relief. Allied Chemical Corp. v. Daiflon, Inc., 449 US 33, 34-35 (1980); In Re: Warden, Kentucky State Penitentiary, No. 88-5521, slip op. 4-5 (6th Cir. Jan 18,1989).

Accordingly, it is ORDERED that appellees' motion to dismiss the appeal for lack of jurisdiction be and hereby is granted. Rule 8, Rules 6th Cir. It is further ORDERED that all other pending motions in the appeal be and hereby are denied.

US DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

No. C-3-88-269 filed Feb 3, 1989 ORDER

As this matter was appealed to the US Court of Appeals forthe Sixth Circuit on Dec 12, 1988 (doc 58), and as the entire file was sent to the Court of Appeals and received on Jan 23, 1989, the District Court has no jurisdiction to proceed with this case until instructed to do so. Therefore, no outstanding motion or future motion will be addressed by this Court unless and until directed to do so by the US Court of Appeals for the Sixth Circuit.

IT IS SO ORDERED. Herman J. Weber, Judge